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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MARY LEE GAINES,

Defendant and Appellant.

A158339

(Contra Costa County
Super. Ct. No. 50811190)

Mary Lee Gaines appeals an order summarily denying her petition for resentencing under Penal Code¹ section 1170.95 without affording her an evidentiary hearing under section 1170.95, subdivision (d). Gaines argues the trial court erred by relying on her record of conviction in determining that she failed to make a prima facie showing of entitlement to relief. Under section 1170.95, subdivision (c), she contends the court was bound to accept as true the allegations in her petition that she was tried on felony-murder and natural and probable consequences theories, that she was convicted of first degree murder by vicariously attributing to her the murderous intent of another person, and that as a result, her conviction may no longer be

¹ All subsequent statutory references are to the Penal Code.

sustained under current law. Seeing no merit to these arguments, we will affirm the order.

I.

On November 3, 2008, the Contra Costa County District Attorney filed a first amended information charging Gaines and codefendant Richard Terry Gaines with the murder of Sheila Hegler. It was alleged that Mary and Richard each personally used and personally and intentionally discharged a firearm, causing Hegler's death.² A "jury found both Richard and Mary guilty of first degree murder, and found the personal use [and personal discharge] of . . . a firearm allegation[s] true as to Mary, but not true as to Richard." (*People v. Gaines* (June 26, 2012, A127338) [nonpub. opn.] (*Gaines*)). Gaines "was sentenced to 50 years to life in state prison." (*Ibid.*) This Court affirmed the judgment as to Gaines in its entirety on June 26, 2012. (*Ibid.*)

The section 1170.95 resentencing petition at issue in this appeal, a pro se pleading filed January 2, 2019, alleges that Richard committed the first degree murder of Hegler while Mary "was charged as an accomplice." Mary alleges she was "deemed an accomplice to a felony murder" and was "not the actual perpetrator." The petition alleges that Mary "did not act with malice aforethought" because she "did not participate in the perpetration of the felony in which a death occurred" and "was not the actual killer," nor did she aid, abet or encourage the actual killer in the commission of murder.

The District Attorney filed an opposition to the section 1170.95 petition arguing that Gaines was ineligible for resentencing. In that filing, the District Attorney urged summary disposition of the petition as a matter of

² We note that these two defendants are brother and sister and bear the same surname. We refer to the appellant in this appeal as either Mary or simply as Gaines. Her brother is specifically identified as Richard or Richard Gaines whenever we make reference to him.

law, contending that Gaines failed to make a prima facie showing entitling her to an evidentiary hearing under section 1170.95, subdivision (d). After appointing counsel for Gaines and considering the opposition brief (Gaines's counsel did not file a reply), the trial court filed a reasoned order agreeing with the District Attorney.

The court concluded that the record of conviction showed the facts alleged in Gaines's petition to be inaccurate. Gaines was not convicted under any form of aiding and abetting or felony-murder theories, it turned out, and her petition failed to show that she could not be convicted of murder under current law. In declining to credit allegations to the contrary in Gaines's resentencing petition, the trial court relied on "the First Amended Information, Abstract of Judgment, court minute orders, jury instructions, and jury verdicts. [Citation.] The court . . . also relied on the statement of facts contained in [this Court's prior] decision affirming [Gaines's] conviction."

Upon an examination of these materials from the record of conviction, the trial court determined that Gaines had been found to be " 'the actual killer' (§ 189(e)(1)), and was convicted of 'simple murder,' not 'felony murder.' " As demonstrated by this Court's opinion affirming Gaines's conviction, the court noted, "the jury clearly determined beyond a reasonable doubt that [Gaines] fatally shot her victim with the requisite state of mind for simple first degree murder." The jury's findings that Gaines, and not Richard, had used and discharged a weapon were quite clearly significant, but the trial court also pointed to a number of "rulings" we made.

In particular, the trial court relied on the following statements in this court's opinion affirming Gaines's conviction: (1) Gaines "was prosecuted for Hegler's death as a perpetrator, not as an aider and abettor"; (2) "the jury

correctly understood it could not find [Gaines] guilty of first degree murder unless it found she personally possessed the requisite state of mind”; (3) while a witness, Tucker, who identified Gaines as the shooter, was vague on many things, Tucker “consistently attributed the shooting of Hegler to [Gaines] and [Gaines] alone”; and (4) “the jury could not reasonably have found that [anyone else] . . . was responsible for shooting Hegler.” (*Gaines, supra*, A127338.)

The trial court observed it was unclear whether Gaines’s jury had been instructed on a natural and probable consequences theory of culpability, but concluded she had not borne her burden of showing that such an instruction had been given.³ Finally, the trial court found significant that, in the prior appeal, Gaines unsuccessfully attacked the evidence of premeditation and deliberation supporting her first degree murder conviction. Here, the court pointed to our determination that there was clear evidence Gaines brought a gun to the confrontation that led to Hegler’s murder and that the circumstances indicated she anticipated using it. (*Gaines, supra*, A127338.)

Accordingly, the court determined, not only is it possible to rule out aiding and abetting or felony-murder liability on this record, but “a reasonable trier of fact, properly instructed under current law, could reach a guilty verdict [against Gaines] on a charge of first degree murder.”

³ We note that, in attacking her conviction, Gaines claimed error in an instruction entitled “Equal Liability of All Principals,” contending it could have permitted the jury to find her guilty on a theory of aiding and abetting, acting as an accomplice to Richard. (*Gaines, supra*, A127338.) This court rejected that instructional argument, and in any event concluded the instructional language Gaines relied upon, even if erroneous, was harmless. “Based on th[e] evidence of premeditation and deliberation on [appellant’s] part,” we said, “any error in giving [an aider and abettor jury instruction], in the form it was given, was harmless beyond a reasonable doubt.” (*Ibid.*)

II.

The issue of whether trial courts may consider the record of conviction in determining whether a section 1170.95 petitioner has stated a prima facie showing of eligibility for resentencing relief is currently on review before the California Supreme Court. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1138, review granted Mar. 18, 2020, S260598 [trial court may summarily deny petition where record of conviction shows petitioner was convicted of murder without instruction or argument based on felony-murder rule or natural and probable consequences doctrine].) Until otherwise advised by the California Supreme Court, we take the view that the answer to that question is yes.

Trial courts undertaking an evaluation of the sufficiency of a petitioner’s prima facie showing under section 1170.95, subdivision (c) “should assume all facts stated in the section 1170.95 petition are true . . . [and] should not evaluate the credibility of the petition’s assertions, but . . . need not credit factual assertions that are untrue as a matter of law” (*People v. Drayton* (2020) 47 Cal.App.5th 965, 980.) “[I]f the record, including the court’s own documents, ‘contain[s] facts refuting the allegations made in the petition,’ then ‘the court is justified in making a credibility determination adverse to the petitioner’ ” in assessing prima facie entitlement to relief. (*Id.* at p. 979; see *People v. Verdugo* (2020) 44 Cal.App.5th 320, 327–328, review granted Mar. 18, 2020, S260493.)

A defendant convicted of simple murder, as confirmed by a jury finding of the defendant’s use and discharge of a weapon in the killing, and by appellate rejection of the possibility that the conviction rested on aiding and abetting or felony-murder theories, should not be allowed to plead—contrary to the record of conviction—that she was convicted on the basis of vicarious

liability stemming from another person's conduct. The petitioner in this case does not even claim to have new or additional evidence that she wishes to present at a section 1170.95, subdivision (d) hearing. From what we can discern, she simply wants to relitigate whether she, in fact, shot Hegler to death. In our view, that is not permissible under section 1170.95.

DISPOSITION

The trial court's order denying Mary Gaines's section 1170.95 resentencing petition is affirmed.

STREETER, Acting P. J.

WE CONCUR:

TUCHER, J.
BROWN, J.